Supplement to #17 2-3-6-14

A MINORITY REPORT

BY

FRANCIS NEAL PARKE

OF THE

COMMISSION ON PENAL REFORM

MARCH 24, 1914.

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To His Excellency, Phillips Lee Goldsborough,
Governor of Maryland:

Any dissent from the conclusions of the Commission on the Revision of Penal Laws and Prison Reforms invites criticism and exacts justification. In so grave a matter, it becomes imperative to state the objections and to present the reasons. This is no less a duty to your Excellency than to the General Assembly of Maryland.

The objections to the bill establishing the "State Board of Prison Control" are to the provisions of some of its sections. The opposition to the entire bill creating an "Advisory Board of Parole" is because of its fundamental principles. The two bills should be separately considered.

THE STATE BOARD OF PRISON CONTROL.

The objections to the bill providing for a State Board of Prison Control are the unlimited supervisory power given over the various penal and reformatory institutions of the State; and the prohibition of imprisonment in the city and county jails when the sentence is for more than six months in the case of a man and thirty days in the event that the offender be a woman.

I.

Section 395 of the bill makes the State Board of Prison Control the dominant and controlling board over all the penal and reformatory institutions of the State. Its terms are explicit:

> "Section 395. The State Board of Prison Control * * * * shall have

any and all incidental powers and authority appropriate and convenient to enable the said Board to fully discharge the powers of management, *supervision,* visitation and inquisition conferred upon them by this Act. *And the said Board shall have supervisory, visitorial and inquisitorial power over all institutions to which any person may be committed as a delinquent, whether such institution be a State, County or City institution, or private institution, receiving State, County or City aid."*

The power of supervision is a right to take charge of, with the authority to direct or regulate. *37 Cyc., 604; 27 A. & E. Ency. of Law (2nd ed.) 407.* This wide grant of authority would make subordinate to the will and judgment of the State Board of Prison Control the governing bodies of the City Jail, of the House of Refuge, of the Female House of Refuge, of the House of Good Shepherd, of the House of Reformation, Colored Boys, of the Industrial Home for Colored Girls, and of the Saint Mary's Industrial School. The result would be conflict of authority, clash of judgment, confusion in administration, and decline in efficiency.

II.

In the next place, sections 421 and 423 of the bill establishing a State Board of Prison Control require that where a man shall be sentenced for for more than *six months,* and a woman for over *thirty days,* the place of imprisonment must be the Penitentiary or a House of Correction. The existing discretion of the court to send the party to jail is brought to an end. It is submitted that the courts should not be deprived of the right of sentencing to a city or a county jail for the following reasons:

1. It will crowd the normal jail population into the Maryland Penitentiary and the Houses of Correction, and over-tax the capacity of these institutions and interfere with their proper management.

2. It means an increase in the expenses of the counties and of Baltimore City by the payment of the transportation charges for prisoners and sheriffs, and of the fees to the sheriffs for every prisoner taken.

3. It will practically destroy the relief the State obtains through the efficient administration of the Baltimore City Jail, and it would, in a large measure, render useless the county jails as places of imprisonment.

4. A sentence to the Penitentiary or House of Correction is regarded as a greater disgrace than a jail term, and it cannot accomplish much by way of reformation with misdemeanants undergoing a brief imprisonment.

5. Frequently motives of humanity and effectiveness of punishment are best obtained by confinement to a jail, yet this ancient discretion of the court is to be denied. Minor offenders of both sexes from Worcester, Wicomico, Allegany and Washington and other counties will be moved at great cost in fares and fees into the State institutions to their unwholesome overcrowding, and, after a brief and unprofitable incarceration, will be turned loose, without money, to find their ways home as best they may.

The way to avoid these results is to let the court determine the place of confinement. If the jail be not fit for the purpose, the court may be trusted not to send prisoners to it.

ADVISORY BOARD OF PAROLE.

The Commission was agreed that "there was some doubt as to whether or not the parole power

could constitutionally be conferred upon a Board created by act of the Legislature." In this dilemma a majority of the Commission determined to submit a bill creating an Advisory Board of Parole in the hope that "Under this Bill all of the essential features of the Indeterminate Sentence system may be successfully worked out." To quote again from the majority report of the Commission:

> "It is the duty of this Board, under its appropriate rules, to examine into the cases of all persons confined in the various Penal Institutions of the State, and to report to the Governor upon such cases as may seem suitable to it for conditional pardons, and to make such recommendations thereon as to it shall seem proper. Upon receipt of such recommendations, *the Governor may, if to him seems meet, exercise his constitutional power to issue conditional pardons on the terms recommended by the Board, or on such terms as he may prescribe.*" *p. 2.*

This statute can neither give nor deny to the Governor his constitutional prerogative of granting or withholding pardons. All that the advocates of this act can expect is that the Governor will vivify an otherwise lifeless enactment by accepting its suggestions. If the governor does not believe in the principle of an indeterminate sentence, or for any cause is not willing to quicken this act into life by his hearty co-operation, it is a dead act in practically everything but constant expense to the tax-payers. Of course, there are minor features of the act which would be operative, but its declared chief purpose is to put into practical use the indeterminate sentence.

The value of the indeterminate sentence is debatable, but, whatever its merits, the act proposed is objectionable on the following grounds.

I.

The act is not accurately speaking a *law* as its operation is according to the varying will of the successive executives of the State. Even when an executive shall proceed under its provisions, he is amenable to no rule and subject to no restraint. All safeguards against tyrannical power, and its arbitrary abuse, are swept away in this reckless declaration that, unless the governor himself shall prescribe otherwise, *the governor*

> *"shall be the sole judge of whether or not the conditions of said pardon have been breached, and the determination by the Governor that the conditions of the pardon have been violated by the person receiving the same shall be final and not subject to review by any court of this State." (Section 7D.)*

The condition of the pardon may be anything. For instance, it may be that the convict shall support his family; or that he shall be industrious and sober; or that he shall keep the peace; or that he shall make weekly payments by way of restitution to one injured by his crime; or that he shall report at regular intervals to the parole officers; or that he shall go regularly to church. Of any breach of such conditions the governor is not only the accusor but also the jury and likewise the judge. Denied even the right of being confronted with the accusation and deprived of any opportunity to show that he has faithfully performed the condition of his liberation, the convict is exposed to the will of the executive with no refuge in court or jury.

The intolerable nature of this legislation is accentuated by the reflection that the governor must necessarily depend for his facts on the reports of the parole officers, yet the accused is

given no right to show the falsity of such reports. An accusation is enough. The convict must return to prison for an act of which he may be guiltless, and serve out his sentence. This dreadful power could be made a most potent political engine to carry primaries and elections. Every convict conditionally pardoned, with his family and friends, would live in the shadow of this arbitrary power and would be the reigning governor's man.

All experience is thrown to the winds, and court is paid to despotic rule. "He who bids man rule adds an element of the beast; for desire is a wild beast and passion perverts the minds of rulers, even when they are the best of men." The rule of law is preferable to that of any individual. *Politics of Aristotle, Book III, sec. 16, 5 and 7.* "No one should forget for a day that our government, like all free governments, is one of laws and not of men."

It is no answer to say that under our existing Constitution the governor may issue conditional pardons. The theory of our Constitution is that a pardon is a State's sovereign *favor* while the statute under discussion proceeds upon the theory that a pardon is a *right* of every prisoner who is believed to have reformed before the expiration of his sentence. There is a vast difference between a favor and a right. Moreover, the fundamental idea underlying this plan is that the governor will become the facile hand of the Advisory Board, and simply affix his signature to what the Board shall recommend. *In effect, what is proposed is that the governor shall surrender to a Board what the people have delegated exclusively to him.* And this Board is under no restrictions except those imposed by rules of their own devising. In the course of time, it is to be feared that the warning

of Edmund Burke will be realized. *"An arbitrary system, indeed, must always be a corrupt one."*

II.

The act may become a practical nullity so far as its principal object is concerned by any governor simply ignoring it. Its value does not spring from the legislative mandate, but depends wholly upon the will of the successive executives of the State. It may be rejected in one administration, tepidly enforced in another, or actively employed in a third, then utterly ignored in a fourth, and so on through recurring cycles. No one can positively affirm that a single conditional pardon will ever be granted within the purview of this act. *Yet the Advisory Board of Parole shall continuously be engaged in advising pardons.* Imagine the effect upon prison discipline and upon the minds and conduct of the convicts, when the Board, "upon examination shall be of the opinion that both the interests of the State and the interests of any prisoner sentenced under the laws of the State of Maryland would be best subserved by a conditional pardon," and shall, as is its duty, recommend to the governor the conditional pardon of prisoners; and the governor nullifies this act by casting its recommendation into a pigeon-hole.

This is not a government by laws but by edicts. What useful end is gained by passing a statute, which may never be enforced, and which does not confer upon the governor any power he does not now possess? It is idle, futile legislation.

> "Laws or ordinances of any kind * * * * which fail of execution are much worse than none. They weaken the government, expose it to contempt, destroy the confidence of all men, native and foreigners, in it; and expose both aggregate bodies and individuals who have placed

confidence in it to many ruinous disappointments." *Pelatiah Webster.*

III.

The Constitution of the State puts upon the governor the sole power and responsibility of a pardon. It was never intended that he should share these with any one. This is made clear by the constitutional exaction that *"he shall report to either Branch of the Legislature, whenever required, the petitions, recommendations and reasons which influenced his decision." Art. II, sec. 20.*

To provide a special tribunal to determine what the executive alone should determine weakens the present weighty sense of personal responsibility. It enables the governor to exculpate himself, in any instance, by stating that he acted upon the recommendation of a board created for that purpose by the General Assembly, and the board may in turn, with greater truth, absolve itself of blame by contending that the Constitution placed the ultimate responsibility upon the governor. Division of political responsibility is lessened political efficiency. If the proposed statute be passed, pardon brokers will have two avenues of approach, with legitimate protection to the public against unmerited pardons diminished by the division of authority. It is easier to grant a pardon than to hold an ungracious front to the importunities of grief and of influence. Why should society sacrifice the protection it finds in the present personal and sole responsibility of the governor?

While theoretically the responsibility for a pardon will remain with the governor yet the practical result of this division of responsibility will be, in the case of a complaisant executive, a tendency to deprive the people of two of the greatest

securities they possess for the proper performance of a delegated power. In the first place, the restraint of public opinion is weakened in the popular confusion as to which, among four, should bear the consequences of a wrongful pardon. And, secondly, ease and precision are lost in the ascertainment of which official is culpably responsible for a pardon inimical to the public welfare.

One of the reasons for reposing in the governor the power to pardon is thus succinctly expressed in The Federalist:

> "It is not to be doubted that a single man of prudence and good sense is better fitted, in delicate conjectures, to balance the motives which may plead for and against the remission of the punishment than any numerous body whatever." *p. 498, edition edited by Ford.*

It is evident that the bill creating an Advisory Board of Parole is not in accord with the spirit of our State Constitution. The Commission has prepared a bill to amend the Constitution so as to authorize the General Assembly to adopt any form of the principles of the suspension of sentence, of the indeterminate sentence, and of the release upon parole. This bill has the approval of the Commission. If this amendment to the Constitution be adopted, a law can then be passed which will not be open to objections, which are apart from the merits of the theory of the indeterminate sentence. The objections to the bill now before the General Assembly may be repeated. They are that the bill is of doubtful constitutional sanction; that it depends upon the personal favor of the executive to become effective, and that it confers to an unwarranted extent arbitrary powers of a dangerous nature.

THE INDETERMINATE SENTENCE.

"Under the indeterminate sentence it is intended, either by restraints or reformations, that prisoners once committed to our prisons shall then and thereafter be permanently withdrawn from the ranks of offenders." *Z. R. Brockway, Correction and Prevention, Russell Sage Foundation, p. 95.*

No one can quarrel with such a high and noble aim, but the practical question remains: Can this intention be made effective through the indeterminate sentence? "A rule, which, in speculation, may seem the most advantageous to society, may yet be found, in practice, totally pernicious and destructive." *Hume's Enquiries, 154.*

Arguments and facts are urged either way. numerous authorities are on one side or the other, but the value of the testimony in favor of the indeterminate sentence is seriously impaired by the great variety *in form* of the indeterminate sentence laws, and by the absence of trustworthy and adequate statistics. The theoretical indeterminate sentence is one where a convict is sentenced to confinement until he is reformed and made a suitable member of society; but this theoretical view is rejected in legislation. The actual indeterminate sentence as exemplified in twenty-two states in which it has been adopted is not the theoretical or indefinite sentence, but is a medley of twenty-two different varieties. With this discord in legislation, with no diminution of crime in the States in which it is in force, and with no reliable statistics to support its pretensions, the value of an indeterminate sentence in prison reform is clearly not a closed question.

An Indeterminate Sentence Commission consisting of W. W. Willoughby, of Johns Hopkins University, Henry J. Ford, then of Johns Hopkins

University and now of Princeton University, John T. Stone, Leigh Bonsal and John F. Weyler, of Baltimore City, was appointed by Governor Warfield under the Act of 1906, ch. 563, "to make an examination of the working and practical results of laws providing for indeterminate sentences in criminal cases." This Commission made a thorough study of the subject, and its conclusion was stated in the report to Governor Crothers in 1908:

> *"The Commission does not recommend the adoption of the indeterminate sentence system, because it believes that the best results for Maryland may be obtained by action of a less radical nature." p. 2.*

The argument for a definite sentence is compactly put by Simon E. Baldwin, Governor of Connecticut, after more than ten years experience in his State with an indeterminate sentence law:

> "The convict then knows the worst that is before him. He can lay his plans with assurance as to his employment after his discharge. He has received such a sentence as has approved itself to the magistrate or jury before whom his trial took place and who presumably have the best means of determining the degree of his guilt, the nature of his temptation, and all circumstances of extenuation. The sovereign whose laws he has violated has received such satisfaction as was deemed sufficient, no greater and no less. The individuals whom he may have wronged have an opportunity to compare his term of confinement with the measure of his guilt. The sense of public justice in the community at large is offended and every rogue, on the contrary, is encouraged, if punishment be not adequate and certain." *22 Yale Law Review, Nov., 1912, 30, 35.*

All this approved public policy is to be cast aside for a twenty-third variety of the indeterminate sentence. After the judge has sentenced the prisoner to such a period of confinement as his crime merits, the statute proposes that the pardoning power under the Constitution is to be converted into the basis of an elaborate scheme for the reformation of offenders, whereby all prisoners of every degree of criminality shall be of right entitled to a conditional pardon whenever the Advisory Board of Parole shall be of the opinion that their behavior in confinement justifies a release from prison. This unique Maryland variety is objectionable for these principal reasons:

I.

Under this statute every criminal,—no matter what his age, what the atrocity of his offense, what the moral turpitude, what the number of his former offences,—is on an absolute equality with every other criminal. So that the rapist, the murderer, the recidivist, the burglar, the robber all come within its maudlin sentimentality. No penologist whose judgment was worth a farthing ever recommended such a law. Even its strongest advocates assert that the indeterminate sentence is not applicable to such crimes.

And such is the disregard of the safety of the law abiding and innocent that similar boards parole such offenders. Governor Baldwin notes a case in 1912 where a young man in New York committed suicide while under the charge of having violated and then murdered a girl of twelve. There was little doubt of his guilt. On examining his record, it was found that he had been a few years before convicted of the violation of a girl of fourteen, committed to a reformatory, and released on parole after a brief imprisonment. *Supra, 38.* At page 10 of the Report of the Indeterminate Sentence Commission is given an instance of the parole of a murderer. In the New York

Times of Feb. 4, 1914, the criminal career of a paroled burglar is described. In 41 National Corporation Reporter it will be found that a twice paroled highwayman and would be murderer was shot in resisting arrest for a robbery committed in Chicago.

No opportunity should be given for these things to occur in Maryland. Such serious crimes do not admit of the bestowal of a conditional pardon.

II.

The release of the prisoner before the expiration of the term imposed by the court depends upon the judgment, the will, or the caprice of the Advisory Board of Parole. As Governor Baldwin remarks: "To be sent to prison there to remain during the pleasure of any man, or set of men, hardly comports with the spirit of modern government." The decision of this Board is made privately, and its action is not subject to any review. A prisoner has no redress, if discriminated against. Cant and hypocrisy, and simulated reform and industry, and abject subserviency to warden and guards in the hope of their favorable report, will be the rule. The uncertainty of pardon, with the conviction that others less deserving are obtaining it, will unsettle the minds of the convicts, foment discontent, and have a bad effect upon discipline.

Moreover, who shall read the hearts of men? How can the Board determine when a man has reformed when he has no opportunity, no incentive to evil? The only opportunities in prison to determine a change in moral character are in relation to the prison routine and discipline. To judge men by their actions they must be free. "As is well known, expressions of regret and repentance on the part of the offender deserve but little attention, and the good conduct of a prisoner in his cell by no means warrants the belief that when

set at liberty, he will not resume his former ways." *Garofalo, in Criminology, Mod. Crim. Sci. Ser., 431, 433.*

It is not astonishing that the results of the indeterminate sentence have not measured up to the claims of its advocates. Garofalo asserts that of those released from the Elmira Reformatory 20 per cent. commit a second offense within six months following their release or parole. *p. 266, 267.* The Prison Association of New York conducted an examination of the after lives of the men released on parole from Elmira Reformatory during the year 1904 to the Prison Association as parole agent. The research showed that forty per centum had by 1910 found their way back behind the bars. *North Am. Review, April, 1912, 487, 488.*

III.

Another powerful argument against the adoption of this bill is that at least 60 per cent. of the criminal population of Maryland is colored while less than 20 per cent. of the whole population of the State are of that race. As stated at page 23 of the Report of the Indeterminate Sentence Commission in 1908:

> "For many reasons, which need not be stated here, we believe that our negro criminal population would be as a whole entirely unsuited to the indeterminate sentence system."

IV.

The sociological effect of this law would be to increase the current of dissatisfaction with the administration of the criminal law and the punishment of the offender. It would be a sad commentary upon public morals, if the people did not look upon arson, murder, theft and burglary and crime generally with horror and reprobation. The public demand for the punishment of the criminal

is a manifestation of sure instinct and of a healthy state of morals. "The first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong. If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy this craving itself, and thus avoid the greater evil of private retribution." *Justice Holmes in the Common Law, pp. 41, 42.* It will not be found popular with the people of this State to introduce another element of uncertainty as to whether or not a criminal will suffer a fitting punishment for his crime. The protection of society through the deterrent force of certain detection, swift trial and definite punishment is more important than the reformation of the prisoner. The first is primary, and the second, is subsidiary.

It is regrettable that there was not unanimity of conclusion. Dissent, however, may serve a useful purpose, if it shall aid in the consideration of the vital matter now before the General Assembly of Maryland.

Respectfully submitted,

FRANCIS NEAL PARKE,
of the Penal Reform Commission.

Westminster, March 24, 1914.